

IP 06-0225-M 1 F USA v Applegate
Magistrate Kennard P. Foster

Signed on 09/06/06

NOT INTENDED FOR PUBLICATION IN PRINT

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

RUSSELL APPEGATE,

Defendant.

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CAUSE NO. IP 06-0225M-01

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

RUSSELL APPEGATE (APPEGATE) is charged by Criminal Complaint that was issued on August 30, 2006, with one count of possessing a firearm after having been convicted of a felony offense, in violation of Title 18 U.S.C. Section 922(g)(1). On August 30, 2006, at the initial appearance, the government moved for detention pursuant to 18 U.S.C. § 3142(f)(1)(A), crime of violence¹, and §§ 3142 (f)(2)(A) & (B) on the grounds that the defendant is a serious risk to flee and a serious risk to obstruct, or attempt to obstruct, or threaten, injure, or intimidate or attempt to threaten, injure or intimidate a prospective witness.

¹ The unlawful possession of a firearm by a convicted felon is not a crime of violence per se. However, it may be a crime of violence under certain circumstances; it is a fact intensive inquiry.

A preliminary examination and detention hearing was held on September 5, 2006. The United States appeared by Assistant United States Attorney Sharon M. Jackson. APPLEGATE appeared in person and by his counsel, William H. Dazey, Jr. The Court found multiple bases for a detention hearing pursuant to 18 U.S.C. § 3142 (f)(2)(A) and (B).

The government established by clear and convincing evidence, predicated upon the facts precipitating Defendant's arrest on August 30, 2006, and his criminal history and record, that no condition or combination of conditions will reasonably assure the safety of the community if he is released. The government also established by clear and convincing evidence, although on a preponderance is required, of the evidence that there is no condition or combination of conditions that would reasonably assure Defendant's appearance. The Court ordered that Defendant be detained.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

1. APPLEGATE is charged by Criminal Complaint that was filed on August 30, 2006. The charges allege that the defendant was in possession of a firearm after incurring a felony conviction in violation of 18 U.S.C. § 922(g)(1).

2. The maximum penalties for violating 18 U.S.C. § 922(g)(1), as charged in the indictment include ten years' incarceration, three years of supervised release, and a fine of \$250,000. If the defendant has three or more qualifying felony convictions, then the maximum term of imprisonment is no less than 15 years to life and supervised release is increased to five years.

3. The government submitted testimony and evidence on the matter of detention. The government called Special Agent Steven Alexander, ATF, who testified that the transaction in which the defendant acquired the firearms in question through a straw purchaser, as outlined in the Probable Cause Affidavit, was videotaped and audiotaped. Agent Alexander also testified that a Search Warrant was obtained for the defendant's residence and the search resulted in the seizure of seven additional firearms and approximately 1400 rounds of ammunition. Agent Alexander further testified that some of the ammunition recovered was of a different type than could have been used in the firearms recovered. Agent Alexander testified that it appeared the defendant resided in the home alone. Finally, Agent Alexander testified that, in the course of his investigation, he acquired two documents, one from South Dakota and one from Wisconsin, regarding the defendant's failure to appear in criminal court cases there. Both events occurred in the summer of 2005 and in particular, in the Wisconsin case, the defendant forfeited a \$30,000 cash bond by his failure to appear.

The government also called Fountain County Sheriff Bass who has been a law enforcement officer in the Fountain County area for approximately 20 years. Sheriff Bass testified that he has know the defendant since age 16. Sheriff Bass testified that on Wednesday, August 23, 2006, while booking the defendant on state felony charges of Resisting Arrest, that the defendant threatened to kill the Sheriff and other law enforcement officers. Sheriff Bass

also related that the state felony Resisting charge arose from the defendant directing his vehicle directly at another officer's marked police car when that officer was attempting to stop APPLEGATE. Sheriff Bass also testified that Fountain County had revoked the defendant's bond in the Resisting Case. Sheriff Bass further testified that the defendant also has pending felony Intimidation charges and a misdemeanor Harassment charge in Montgomery County and that bond will be revoked. During the many years that Sheriff Bass has known the defendant who generally lives alone, numerous persons in the community have reported that the defendant has threatened them. Sheriff Bass testified that the defendant's 2004 felony Criminal Recklessness conviction stemmed from the defendant attempting to harm his neighbor with whom he was having a dispute.

4. The Court admitted as Exhibit 1 the Pre-Trial Services Report prepared by the U.S. Probation Office on the issue of Defendant's release or detention. Neither party objected to the admission of Exhibit 1.

5. Exhibit 1 demonstrates Defendant's criminal history to include at least 2 criminal convictions for crimes of violence, specifically a 1994 and a 2004 conviction for Criminal Recklessness. Government's Exhibit # 3 evinces that the defendant also has a 2003 felony conviction for Stalking. Court's Exhibit 1 further demonstrates that Defendant failed to appear for court dates on at least seven occasions and violated the terms of court-imposed probation on several occasions.

6. Defendant qualifies for a detention hearing upon the government's motion that the defendant presents a serious risk of flight and a serious risk to obstruct, or attempt to obstruct, or threaten, injure, or intimidate or attempt to threaten, injure or intimidate a prospective witness. 18 U.S.C. § 3142(F)(1)(B).

7. Defendant qualifies for a detention hearing upon the Government's motion at the detention hearing that this case involves a serious risk that Defendant will flee. 18 U.S.C. § 3142 (f)(2)(A). Defendant's conduct and criminal history demonstrate a propensity to disregard the law, including court orders.

8. The evidence relevant to the factors set forth in 18 U.S.C. § 3142(g) requires that Defendant be detained as there is no condition or combination of conditions of release sufficient to reasonably assure that he will not engage in dangerous criminal activity pending trial. Therefore, Defendant is ORDERED DETAINED.

9. When evaluating the government's motion for pretrial detention, the Court engages a two-step analysis: first, the Court determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *See United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two

types of risks. A defendant is eligible for detention upon motion by the United States in cases involving: (1) a crime of violence; (2) an offense with a maximum punishment of life imprisonment or death; (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more; or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses. *See* 18 U.S.C. § 3142(f)(1). A defendant is eligible for detention upon motion by the United States or the Court *sua sponte* in cases involving: (5) a serious risk that the person will flee; or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *See* § 3142(f)(2); *United States v. Sloan*, 820 F. Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. *See* 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. *See also United States v. DeBeir*, 16 F. Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F. Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moved for detention pursuant to 18 U.S.C. §§ 3142(f)(1)(A) and (f)(2)(A). The Court has found that the government satisfied its burden of establishing that these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions set forth in Section 3142(f), the court may order a defendant

detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. See 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. See *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. See *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S. Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2d Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F. Supp. 591, 596 (N.D. Ind. 1987).

With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S. Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F. Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S.

418, 431-33, 99 S. Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

10. The Court further considers the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

11. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. Defendant has had persistent and continuous contacts with law enforcement. In light of the number and nature of these contacts, Defendant has established a pattern of violence and disregarding the law. Not only is he a scofflaw who continually flouts the law, but importantly, he threatens harm to those who cross him. If released, he will not follow the law or the conditions of pre-trial release. Defendant presents a serious risk to the community.

b. The evidence presented demonstrates a high probability that Defendant will be convicted of the charged offense.

c. Defendant has a history of failing to appear for court and violating terms of court-imposed probation. Defendant will even abandon large sums of money posted as bail when he flees. Defendant presents a serious risk of flight.

The Court having weighed the evidence regarding the factors found in 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that the Defendant clearly and convincingly is a danger to the community and a risk of flight. The Court further concludes by a preponderance of the evidence that Defendant is a serious risk of flight.

WHEREFORE, RUSSELL APPLGATE is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with

defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with a Court proceeding.

Dated this ____ day of September, 2006.

KENNARD P. FOSTER
United States Magistrate Judge
Southern District of Indiana
Southern District of Indiana

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U. S. Probation, Pre-Trial Services

U. S. Marshal Service